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No. 04-923

In the Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the waiver of sovereign immunity in 28 U.S.C. 1961(c)(2) for post-judgment interest is limited to adverse judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Chickasaw Nation v. *United States*, 534 U.S. 84 (2001) 9
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 12
Kaffenberger v. *United States*, 314 F.3d 944 (8th Cir. 2003) 10
Lamie v. *United States Trustee*, 540 U.S. 526 (2004) 9
Library of Cong. v. *Shaw*, 478 U.S. 310 (1986) ... 6, 10
Marathon Oil Co. v. *United States*, 236 F.3d 1313 (Fed. Cir. 2000) 2
Mobil Oil Exploration & Producing S.E., Inc. v. *United States*, 530 U.S. 604 (2000) 2
Ortloff v. *United States*, 335 F.3d 652 (7th Cir. 2003), cert. denied, 540 U.S. 1225 (2004) 10
Rosenfeld v. *United States*, 859 F.2d 717 (9th Cir. 1988) 12
Thompson v. *Kennickell*, 797 F.2d 1015 (D.C. Cir. 1986) 9
Transco Leasing Corp. v. *United States*, 992 F.2d 552 (5th Cir. 1993) 8
Trout v. *Garrett*, 891 F.2d 332 (D.C. Cir. 1989) 12
United States v. *Nordic Vill., Inc.*, 503 U.S. 30 (1992) 10

Cases—Continued: Page

United Steelworkers v. *North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), cert. denied, 510 U.S. 1114 (1994) 10

Constitution and Statutes

U.S. Const. Art. III 12
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 3
28 U.S.C. 1961(b) 4, 8
28 U.S.C. 1961(c) 9
28 U.S.C. 1961(c)(2) 3, 4, 5, 6, 7, 8, 9, 10, 11
28 U.S.C. 1961(c)(3) 9
28 U.S.C. 1961(c)(4) 9
28 U.S.C. 2516(b) (1976) 4, 8
28 U.S.C. 2516(b) 3, 6
31 U.S.C. 1304(b) 4, 5, 8, 11

Miscellaneous:

S. 1700, Tit. III, § 302, 97th Cong., 1st Sess., (1981) 7
127 Cong. Rec. (1981):
p. 23,093 7
p. 29,865 7
p. 29,865-29,866 7
p. 29,865-29,867 7
p. 29,866 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 374 F.3d 1123. The opinion of the Court of Federal Claims (Pet. App. 34a-51a) is reported at 56 Fed. Cl. 768.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2004. A petition for rehearing was denied on October 7, 2004 (Pet. App. 52a-53a). The petition for a writ of certiorari was filed on January 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. In 1997, the Court of Federal Claims issued a judgment against the United States awarding damages to Mobil Oil Exploration and Producing Southeast, Inc.

(petitioner) and the Marathon Oil Company (Marathon) for breach of contract. Pet. App. 36a. The Federal Circuit reversed. *Ibid.* This Court granted the companies' petition, reversed the court of appeals' judgment, and remanded the case to that court for further proceedings. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604 (2000).

On remand, the court of appeals affirmed the judgments of the Court of Federal Claims awarding damages to the companies. *Marathon Oil Co.* v. *United States*, 236 F.3d 1313 (Fed. Cir. 2000). The Court of Federal Claims subsequently reinstated its judgments awarding damages to the companies, effective as of their original date. Pet. App. 37a.

Petitioner and Marathon then sought payment of their awards from the Department of Treasury. Pet. App. 37a. Both relied on the judgment of the Court of Federal Claims, rather than the judgment of the court of appeals, as the source for the award. *Id.* at 42a. Neither sought post-judgment interest. *Id.* at 37a. The United States informed the Department of the Treasury that the government would not seek further review and requested that the awards be certified and paid from the Judgment Fund. *Ibid.* The judgments were subsequently paid to petitioner and Marathon. *Ibid.*

After receiving their awards, petitioner and Marathon sought from the Department of the Treasury post-judgment interest running from the date of the court of appeals' judgment on remand from this Court to the date of the payment of their awards. Pet. App. 38a. The United States denied post-judgment interest based on sovereign immunity. *Ibid.*

2. Petitioner and Marathon then filed suit in the Court of Federal Claims, seeking post-judgment in-

terest in reliance on 28 U.S.C. 1961(c)(2). Pet. App. 38a. That provision specifies that, except in tax cases, "interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal [C]ircuit, at the rate provided in subsection (a) and as provided in subsection (b)."

The Court of Federal Claims rejected the companies' claim. Pet. App. 34a-51a. The court reasoned, *inter alia*, that Section 1961(c)(2) waives the United States' immunity from claims of post-judgment interest only with respect to judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States. *Id.* at 44a-49a. Because the United States had not petitioned for review of the court of appeals' judgment, the Court of Federal Claims explained, Section 1961(c)(2) did not authorize post-judgment interest in this case. *Id.* at 48a-49a.

3. The court of appeals affirmed, holding that Section 1961(c)(2) authorizes interest on a judgment issued by the Federal Circuit only when the judgment is affirmed by this Court after review on petition of the United States. Pet. App. 1a-33a. The court noted that before Congress enacted the Federal Courts Improvement Act of 1982 (FCIA), Pub. L. No. 97-164, 96 Stat. 25, which created the Federal Circuit, federal law authorized interest on a judgment against the United States issued by the Court of Claims (its predecessor) only when the judgment was affirmed by the Supreme Court after review on petition of the United States. Pet. App. 12a (citing 28 U.S.C. 2516(b) (1976)). While the companies argued that the FCIA broadened the waiver of sovereign immunity to encompass any judgment issued by the Federal Circuit, the court found it "nearly

beyond comprehension" that Congress would have made such a "sweeping change." *Id.* at 14a.

The court of appeals rejected the companies' argument that the language of 28 U.S.C. 1961(c)(2) unambiguously authorizes post-judgment interest on all Federal Circuit judgments against the United States. Pet. App. 15a. The court noted that Section 1961(c)(2) authorizes interest only "as provided in subsection (b)," and that Section 1961(b) authorizes daily computation of interest except as provided in two other provisions—28 U.S.C. 2516(b) and 31 U.S.C. 1304(b)—that address only judgments issued by the Federal Circuit that are affirmed by the Supreme Court after review on petition of the United States. Pet. App. 9a-11a. The court concluded that there are two plausible interpretations of the "except" clause. It might specify the method for calculating interest for one subset of a larger class of judgments against the United States for which post-judgment interest is available. Alternatively, it could specify the method for calculating interest on the only category of cases for which post-judgment interest is available against the United States. *Ibid.* Because a statute that is susceptible of a plausible reading under which sovereign immunity is not waived cannot be construed to waive sovereign immunity, the court concluded that Section 1961(c)(2) must be construed to authorize interest on a Federal Circuit judgment only when the judgment is affirmed by this Court after review on petition of the United States. *Id.* at 17a.

The court of appeals also concluded that the statutory cross-reference to 31 U.S.C. 1304(b), a provision of the Judgment Fund statute, provides additional support for its interpretation. Pet. App. 17a-19a. The court reasoned that since the Judgment Fund statute

appropriates funds for interest only on judgments affirmed by this Court after review on petition by the United States, the reference to Section 1304(b) could plausibly be viewed as limiting the United States' waiver of liability to that circumstance. *Id.* at 18a.

Finally, the court of appeals concluded that the legislative history of the FCIA makes clear that Congress did not intend to depart from the narrow waiver of immunity that preceded the FCIA. Pet. App. 28a-29a. The court explained that the Director of the Office of Management of Budget criticized the original bill on the ground that it would expand the waiver of immunity on post-judgment interest to include all judgments. Following that criticism, the language of the bill was changed to its current form, and the sponsor of the amendment explained that the change was designed to preserve the status quo on the accumulation of interest on judgments. *Id.* at 29a-30a.

Judge Prost dissented. Pet. App. 31a-33a. She concluded that the only plausible reading of Section 1961(c)(2) is that it provides for interest on all judgments issued by the Federal Circuit. *Ibid.*

ARGUMENT

Petitioner contends that 28 U.S.C. 1961(c)(2) waives the United States' sovereign immunity from post-judgment interest on all judgments issued by the Federal Circuit. That contention is without merit. The court of appeals correctly held that Section 1961(c)(2) waives immunity only from post-judgment interest on judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States, and that holding does not conflict with any decision of

this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. a. The legal principles governing the availability of interest against the United States are well established. Absent "express congressional consent" to an award of interest, "the United States is immune from an interest award." *Library of Cong.* v. *Shaw*, 478 U.S. 310, 314 (1986). While any waiver of sovereign immunity must be construed "strictly in favor of the sovereign," there is an "added gloss of strictness" with respect to an award of interest. *Id.* at 318. There can be no waiver "by use of ambiguous language." *Ibid* (citation omitted). The waiver "must be express, and it must be strictly construed." *Ibid.* Applying that standard, the court of appeals correctly concluded that Section 1961(c)(2) authorizes post-judgment interest only on judgments issued by the Federal Circuit that are affirmed by this Court after review on petition of the United States.

The background to the enactment of Section 1961(c)(2) provides convincing support for that conclusion. Before the enactment of the FCIA, a party could recover post-judgment interest on a judgment issued by the Federal Circuit's predecessor, the United States Court of Claims, only when the judgment was affirmed by this Court after review on petition of the United States. 28 U.S.C. 2516(b)(1976). Interpreting Section 1961(c)(2) to authorize interest on all Federal Circuit judgments would therefore attribute to Congress an intention to dramatically expand the availability of an award of interest against the United States.

There is no evidence that Congress affirmatively sought to effect that kind of dramatic expansion of the monetary liability of the United States. To the contrary, the legislative history of Section 1961(c)(2) shows that

Congress sought to preserve the same rule on interest that had existed before its enactment. In response to a proposed Senate bill that would have greatly expanded the United States' liability for post-judgment interest, see S. 1700, Tit. III, § 302, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. 23,093 (1981), the Director of the Office of Management and Budget wrote to the Senate majority leader requesting an amendment to preserve the existing limitation on post-judgment interest. *Id.* at 29,865-29,866. In another letter, the Director confirmed that it had been agreed that "interest will acrue [*sic*] only during the pendency of appeals (from the new Court of Appeals of the Federal Circuit) to the Supreme Court." *Id.* at 29,866. Senator Grassley presented an amendment that embodied the agreement to "retain the status quo with respect to accumulation of interest on judgments of the Court of Claims." *Id.* at 29,865. Congress adopted the amendment, and the critical language in the amendment was carried over into 28 U.S.C. 1961 (c)(2). 127 Cong. Rec. at 29,865-29,867. Thus, Congress's intent in enacting Section 1961(c)(2) was not to expand broadly the government's liability for post-judgment interest, but rather to continue to limit its liability to those cases involving Federal Circuit judgments against the United States that are challenged unsuccessfully in this Court.

b. Petitioner contends that Section 1961(c)(2) effected a dramatic change from prior law because the plain language of the statute authorizes post-judgment interest "on all final judgments against the United States in the United States Court of Appals for the Federal [C]ircuit." Pet. 12 (quoting 28 U.S.C. 1961(c)(2)). That argument ignores the language in Section 1961(c)(2) specifying that interest is authorized

on such judgments only "as provided in subsection (b)." 28 U.S.C. 1961(c)(2). Subsection (b), in turn, provides that "[i]nterest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31." 28 U.S.C. 1961(b). Section 2516(b) authorizes post-judgment interest only on a "judgment against the United States affirmed by the Supreme Court after review on petition of the United States." 28 U.S.C. 2516(b). Section 1304(b) of Title 31 embodies the same limitation, because it authorizes interest only on a judgment "under section 2516(b) of title 28." 31 U.S.C. 1304(b).

Petitioner argues that the cross-references to 28 U.S.C. 2516(b) and 31 U.S.C. 1304(b) establish the method of calculating interest in the subset of cases against the United States covered by Section 1961(c)(2) in which the United States loses in the Federal Circuit, successfully petitions for certiorari, and loses in this Court, leaving the daily computation rule to govern other cases against the United States, such as this one. Pet. 13. But as the court of appeals explained, there is another plausible reading of the cross-references in the "except" clause: they establish the method of calculating interest for the only category of cases in which interest is authorized against the United States, leaving the daily computation rule to operate in non-government cases. In light of the principle that waivers of sovereign immunity must be strictly construed, and the background understanding that Section 1961(c)(2) would preserve existing law, the court of appeals correctly adopted that alternative interpretation.

The decision below is consistent with decisions of other circuits. In *Transco Leasing Corp.* v. *United States*, 992 F.2d 552, 554-555 (1993), the Fifth Circuit

explained that, in light of Section 1961(c)(2)'s reference to subsection (b), "postjudgment interest awarded against the United States under section 1961 is subject to the limitations of section 1304(b)." Similarly, in *Thompson* v. *Kennickell*, 797 F.2d 1015, 1022 n.4 (1986), the D.C. Circuit observed that, "under 28 U.S.C. § 1961(c)(2) the United States would be required to pay interest only during its unsuccessful appeal to the Supreme Court."

c. Petitioner argues that the court of appeals' interpretation is incorrect because it renders Section 1961(c)(2) superfluous. Pet. 14. According to petitioner, it is an immutable rule of statutory construction that no provision may be construed to be redundant. Pet. 15. There is, however, no such absolute rule. See *Lamie* v. *United States Trustee*, 540 U.S. 526, 536 (2004); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). Congress sometimes makes doubly sure that its intent will be given effect. Indeed, as the court of appeals explained, Section 1961(c) contains other redundancies. For example, subsection (c)(3) specifies that interest shall be allowed "only as provided in paragraph (1) of this subsection or in any other provision of law." 28 U.S.C. 1961(c)(3). And subsection (4) states that "[t]his section shall not be construed to affect the interest on any judgment of any court not specified in this section." 28 U.S.C. 1961(c)(4). Neither of those provisions adds a limitation on the scope of Section 1961 that would not have otherwise existed. Similarly, as the court of appeals explained (Pet. App. 16a), rather than "codifying law not provided for elsewhere," Section 1961(c)(2) provides "an overview intended to emphasize and to cross-reference."

Furthermore, the rule disfavoring redundancy at most creates an implication that Section 1961(c) should be interpreted in a different way. Under this Court's sovereign immunity decisions, however, sovereign immunity cannot be waived by implication. Instead, there must be an express and unequivocal waiver. *Shaw*, 478 U.S. at 318. The rule disfavoring redundancy therefore does not undermine the court of appeals' interpretation of Section 1961(c)(2).

Petitioner contends (Pet. 14-15) that the Court's failure to read Section 1961(c)(2) to avoid redundancy conflicts with *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). There is, however, no such conflict. In that case, the Court applied the rule disfavoring redundancy to support its conclusion that a provision of the Bankruptcy Code did *not* constitute a waiver of sovereign immunity. Nothing in the Court's opinion suggests that the preference for avoiding redundancy could support the *opposite* result, namely, a finding of a waiver of sovereign immunity. Nor did the Court suggest that a provision of law can never be redundant.

Petitioner also errs in contending (Pet. 16) that the decision below conflicts with the decisions in *Ortloff* v. *United States*, 335 F.3d 652 (7th Cir. 2003), cert. denied, 540 U.S. 1225 (2004), *Kaffenberger* v. *United States*, 314 F.3d 944 (8th Cir. 2003), and *United Steelworkers* v. *North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), cert. denied, 510 U.S. 1114 (1994). In *Ortloff*, the court relied on the principle disfavoring redundancy to help resolve an ambiguity in an exception to the waiver of sovereign immunity in the Federal Tort Claims Act. 335 F.3d at 657 n.4. In *Kaffenberger*, the court applied the rule disfavoring redundancy to help determine the extent of the government's authority to enter into agreements to

extend the time for filing refund suits. 314 F.3d at 950-953. And in *United Steelworkers*, the court applied the rule disfavoring redundancy to interpret a damages provision.

None of those decisions involved the statutory scheme at issue here or any other analogous statutory scheme. Moreover, none of those decisions suggests that there is some rigid and invariable rule that requires a waiver of sovereign immunity to be interpreted broadly to avoid redundancy, without regard to the background or context of the waiver. There is therefore no conflict between the decision below and those decisions.

2. Finally, petitioner challenges the court of appeals' conclusion that because Congress has only appropriated funds to pay Federal Circuit judgments affirmed by this Court after review on petition of the United States, the waiver of sovereign immunity should be construed to cover only those judgments. Pet. 17-25. The court of appeals' interpretation of Section 1961(c)(2), however, does not depend on that rationale. Instead, the court merely pointed to the scope of Congress's appropriation as an additional argument in support of its interpretation. Pet. App. 17a. Because that argument is not necessary to the decision below, petitioner's attack on it provides no basis for review.

In any event, petitioner's challenge is without merit. Petitioner accuses the court of appeals of concluding that Congress cannot waive sovereign immunity without also appropriating funds to pay a resulting judgment. Pet. 21. But that is not what the court of appeals concluded. Instead, it concluded that because Congress specifically tied together its waiver of immunity with the appropriations statute through a specific cross-re-

ference to 31 U.S.C. 1304(b), it is plausible to construe that waiver to encompass only the cases for which Congress has appropriated funds to pay a judgment. Pet. App. 17a-19a, 22a.

None of the cases cited by petitioner holds that, when a waiver of sovereign immunity incorporates the terms of the Judgment Fund statute by reference, its scope may not be construed in a manner that is consistent with those terms. The plurality in *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568-571 (1962) (plurality opinion), merely recognized that the absence of an appropriation to pay judgments of the Court of Claims did not foreclose that court from exercising Article III judicial powers. *Trout* v. *Garrett*, 891 F.2d 332, 334 (D.C. Cir. 1989), and *Rosenfeld* v. *United States*, 859 F.2d 717, 723 (9th Cir. 1988), held that two other statutes waiving immunity are not limited by the Judgment Fund statute. But as the court of appeals explained (Pet. App. 22a), neither of those cases conflicts with the court's analysis in this case because the statutes at issue in those cases did not contain a cross-reference to the Judgment Fund statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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